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June 2, 2004

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 JUN -3 A 11:39

BY FACSIMILE 202.219.3923  
AND FEDERAL EXPRESS

Jeff S. Jordan  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

Re: *Public Citizen v. Quentin Nesbitt, et al.*  
MUR 5445

Dear Mr. Jordan:

This correspondence responds to the referenced complaint against named Respondent Timothy Dodds, Treasurer of Family First PAC. Please note that a request for an extension of time within which to respond to the complaint was granted by your office and communicated by letter dated May 17, 2004, allowing for an extension through June 2, 2004.

**I. Introduction**

Pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6, Timothy Dodds as Treasurer of Family First PAC (hereafter, "Family First") respectfully submits this response to the Complaint filed by Citizen Action.

The Complaint contains two equally baseless charges against Family First, both of which are based upon mere speculation and conjecture. It alleges (i) that Family First failed to report an earmarked contribution, as required by 11 C.F.R. § 110.6(c), and (ii) that Family First permitted its name to be used for a contribution in the name of another and assisted in the making of such a contribution, in violation of 11 C.F.R. § 110.4(b)(ii) and (iii).

The evidence submitted in support of Complainant's allegations—which consists of Family First's 2003 campaign finance report—is insufficient to warrant further investigation by the Commission. The sum and substance of that evidence is that the contribution to Family First from Quentin Nesbitt in the amount of \$5,000 was received on the same date that the

contribution to Geoff Davis was made, and that Family First received no other contributions and made no other contributions to candidates in 2003. No other evidence is offered by Complainant in support of its allegation of wrongdoing.

## II. Law and Analysis

The Act addresses earmarking in Section 441(a)(8), which provides

All contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

FEC regulations define "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1). "Conduit or intermediary" is defined as any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee, except as otherwise provided. 11 C.F.R. § 110.6(b)(2). Accordingly, for a contribution to be "earmarked" there must be a designation, instruction or encumbrance by the donor that results in a contribution being made to the designee.

The Act also provides that no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution. 2 U.S.C. § 441f. FEC regulations further provide that no person shall knowingly help or assist any person in making a contribution in the name of another. 11 C.F.R. § 110.4(b)(1)(iii).

To determine whether there is reasonable cause to believe that Respondent Family First violated the foregoing provisions of the Act as alleged, it must be demonstrated that the \$5,000 contribution at issue was earmarked by the donor for Geoff Davis' campaign. While it is not disputed that the \$5,000 contribution from the donor was received by Family First, that the \$5,000 contribution to the candidate was made by Family First, and that both contributions were made on the same date, there is no evidence to demonstrate that the contribution from the donor was earmarked for Davis' campaign. In fact, the attached Declaration of Family First Executive Director Tanya Lee conclusively proves the opposite: the contribution was not earmarked for any purpose.

Under the Act, a contribution subject to the Commission's earmarking rules must *in fact* be earmarked by the person making the contribution. It is inappropriate to impute a "designation, instruction or encumbrance" on a contribution in cases where there is no evidence

Jeff S. Jordan  
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that any such designation, instruction or encumbrance was made by the donor. This is such a case. The contribution was received without any accompanying instruction. In fact, the envelope mailed from the donor to Family First contained the \$5,000 check and nothing else. Aside from the check, the donor did not communicate any instructions or suggestions to Family First as to how the contribution was to be utilized. Family First's use of the contribution was left entirely to its discretion, and it chose to contribute the \$5,000 to the one candidate it had endorsed.<sup>1</sup>

### III. Conclusion

Based on the foregoing, Respondent Family First respectfully submits that no further investigation is warranted, and that the complaint should be dismissed.

Sincerely,



David R. Langdon

DRL/het  
enclosure

cc: Tanya Lee  
Timothy L. Dodds

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<sup>1</sup> Whether the donor believed that his contribution would ultimately be used to assist Geoff Davis is not relevant for purposes of determining whether Family First (or the donor, for that matter) violated the applicable earmarking regulations. See, generally *FEC v. Colorado Rep Fed Campaign Comm.*, 533 U.S. 431, 462 (2001).

**FEDERAL ELECTION COMMISSION**  
Washington, D.C.

In re:

Complaint of Citizen Action

MUR 5445

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**DECLARATION OF TANYA LEE**

Pursuant to 28 U.S.C. § 1746, I, Tanya Lee, declare the following:

1. Unless otherwise stated, I have personal knowledge of the matters set forth in this declaration.

2. I am the Executive Director of Family First PAC ("Family First"). I have served in that capacity since 2001.

3. Family First is a multi-candidate political action committee that infrequently endorses and contributes to candidates for federal office primarily in southwestern Ohio and northern Kentucky. For the 2004 primary election, Family First endorsed only one candidate, Geoff Davis. No other primary races merited the attention of Family First.

4. Family First followed its standard process in deciding to endorse Geoff Davis in the three-way primary for the Republican nomination for the 4<sup>th</sup> U.S. House District in Kentucky. That process consists of completing a candidate questionnaire and, if necessary, appearing for an interview before the Family First Board of Directors. In this instance, two of the three candidates for the 4<sup>th</sup> District Republican nomination returned a completed questionnaire. The Board voted in favor of Davis as the better qualified candidate according to

Family First's stringent ideological standards. Family First had previously endorsed and financially supported Davis in his unsuccessful bid to unseat Representative Ken Lucas in 2002.

5. On March 31, 2003, I received a contribution to Family First from Quentin Nesbitt in the amount of \$5,000. The contribution was not earmarked for any particular use. The check arrived in an envelope with no cover letter or other information. In accordance with my standard practice, I forwarded the check to Tim Dodds, our Treasurer. A true and accurate copy of the check is attached as **Exhibit A** and made a part hereof.

6. On the same day the check arrived, I contacted Family First's Board of Directors by email to advise them that we had received a contribution in the amount of \$5,000. The Board Chairman moved that the Board approve a \$5,000 contribution to Geoff Davis. A majority of the Board approved the motion, and a contribution to Davis' campaign was made that same day.

7. At no time did I engage in any conversation (either written or oral) with Quentin Nesbitt or with any person acting on behalf of Quentin Nesbitt wherein an offer, request or suggestion (either explicit or implicit) was made that Mr. Nesbitt's 2003 contribution to Family First be used in any particular manner or, more specifically, to assist Geoff Davis.



8. To the best of my knowledge, at no time did any Family First board member engage in any conversation (either written or oral) with Quentin Nesbitt or his agents wherein an offer, request or suggestion (either explicit or implicit) was made that Mr. Nesbitt's 2003 contribution to Family First be used in any particular manner or, more specifically, to assist Geoff Davis.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 1<sup>st</sup> day of June, 2004.

  
\_\_\_\_\_  
Tanya Lee

25044110666

<b>JEANNE NESBITT</b> <b>QUENTIN NESBITT</b> CINCINNATI, OH 45224		3321
		18-81/420
DATE <u>4-1-03</u>		
PAY TO THE ORDER OF <u>Family Trust</u>	\$ <u>5000</u>	
<u>Five thousand and no/100</u>		DOLLARS
 <b>Fifth Third Bank</b> CINCINNATI, OHIO		<b>PLATINUM</b> <b>ONE ACCOUNT</b>
FOR <u>Contribution</u>		<u>Quentin Nesbitt</u>
		

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